1991

Busch Corporation, dba Busch Development, Inc., and Quailbrook Condominium Company v. State Farm Fire : Brief of Respondent

Utah Supreme Court

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45.9

19859 IN THE SUPREME COURT OF THE STATE OF UTAH

BUSCH CORPORATION, dba BUSCH DEVELOPMENT, INC., and QUAIL-BROOK CONDOMINIUM COMPANY,	)	
Plaintiff and Appellant,	)	
vs.	)	Case No. 19859
STATE FARM FIRE & CASUALTY COMPANY and ROYAL INSURANCE COMPANY,	)	
Defendants and Respondents.	)	

BRIEF OF RESPONDENT STATE FARM FIRE & CASUALTY INSURANCE COMPANY

Appeal from the Judgments of the Third
Judicial District Court
Salt Lake County
Honorable Dean E. Conder

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF RESPONDENT STATE FARM FIRE & CASUALTY INSURANCE COMPANY

NATURE OF THE CASE

This is an action by Appellants to recover under liability insurance policies issued by Respondents STATE FARM FIRE & CASUALTY COMPANY and ROYAL INSURANCE COMPANY.

DISPOSITION IN THE LOWER COURT

The Honorable Dean E. Conder of the Third Judicial District Court granted Respondent STATE FARM FIRE & CASUALTY COMPANY'S Motion to Dismiss and Respondent ROYAL INSURANCE COMPANY'S Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

Respondent STATE FARM FIRE & CASUALTY COMPANY seeks affirmance of the Order of Dismissal entered in its favor by the trial court.

STATEMENT OF FACTS

STATE FARM FIRE & CASUALTY COMPANY, herein referred to as STATE FARM, incorporates by reference the Statement of Facts contained in the Brief of ROYAL INSURANCE COMPANY, herein referred to as ROYAL, with the following additions:

STATE FARM FIRE & CASUALTY COMPANY issued a condominium apartment policy to BUSCH DEVELOPMENT CORP, dba QUAILBROOK CONDOMINIUM, QUAILBROOK EAST CONDOMINIUM HOMEOWNERS' ASSOCIATION for the period beginning August 15, 1980 and ending August 15, 1981. (Record p. 36). The policy contained the following language in Section VII, D.:

> "D. INSURED'S DUTIES IN THE EVENT OF OCCURRENCE, CLAIM OR SUIT:
>
> 1. In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. . .
>
> 2. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.
>
> . . .

G. ACTION AGAINST COMPANY: No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all terms of this policy, . ." (Record, pp. 36 and 56). Emphasis added.

During the time period when this policy was in effect, the prior lawsuit of Earl Phillip Morgan et.al. vs. Busch Development, Inc., et. al. was filed. (Record, p. 3).

The first notice received by STATE FARM against the subject liability policy occurred September 21, 1983, when STATE FARM was served with the Summons and Complaint initiating this lawsuit. (Record p. 34). The notice was five years after the alleged occurrence; three years after commencement of the prior lawsuit and sixteen months after judgment was entered thereon.

As a consequence, STATE FARM was deprived of its rights under the insurance contract to investigate the claim; attempt settlement; hire counsel of its choice and to defend the prior lawsuit. (Record pp. 34-35).

ARGUMENT

POINT ONE

APPELLANTS HAVE NO RIGHT OF INDEMNIFICATION FROM STATE FARM UNDER THE SUBJECT INSURANCE POLICY.

Appellants have no right of indemnification against STATE FARM for the following reasons:

A. BUSCH CORPORATION, dba BUSCH DEVELOPMENT, INC.: BUSCH CORPORATION, dba BUSCH DEVELOPMENT, INC., herein referred to as BUSCH, has no right of indemnification against STATE FARM because it was dismissed as a Party-Defendant in the prior lawsuit entitled Earl Phillip Morgan, et al vs. Busch Development, Inc. et. al., and Quailbrook Condominium Company was substituted in its place. Therefore, the judgment rendered in the prior

lawsuit is against QUAILBROOK CONDOMINIUM COMPANY and not BUSCH. If one concedes that BUSCH is an insured under the subject STATE FARM policy, one must conclude there is no right of indemnification on the part of BUSCH because no judgment was rendered against BUSCH in the prior lawsuit.

B. QUAILBROOK CONDOMINIUM COMPANY: QUAILBROOK CONDOMINIUM COMPANY is not entitled to indemnification against STATE FARM under the subject insurance policy because QUAILBROOK CONDOMINIUM COMPANY is not a named insured. The named insured on the subject policy is BUSCH DEVELOPMENT CORP dba QUAILBROOK CONDOMINIUM, QUAILBROOK EAST CONDOMINIUM HOMEOWNERS' ASSOCIATION. (Record, p.36). Accordingly, QUAILBROOK CONDOMINIUM COMPANY is also not entitled to indemnification against STATE FARM.

Appellants have argued that a material issue of fact exists as to whether QUAILBROOK CONDOMINIUM COMPANY qualifies as a named insured under STATE FARM'S policy. The argument fails to take into account that STATE FARM'S Motion to Dismiss was treated as a Motion for Summary Judgment and was supported by Affidavit. Appellants filed no Affidavit by way of response. Under such circumstances, Franklin Financial vs. New Empire Development Company, 659 P.2d 1040, (Utah, 1983) applies. In that case, this court held:

> "The opponent of the Motion (Summary Judgment), once a prima facie case for Summary Judgment has been made, must file responsive Affidavits raising factual issues, or risk the trial court's conclusion that there are no factual issues. Rule 56(e).
>
> . . .
>
> Thus, when a party opposes a properly supported Motion for Summary Judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of material fact unless the face of the movant's Affidavit affirmatively discloses the existence of such an issue. Without such a showing, the court need only decide whether, on the basis of the applicable law, the moving party is entitled to judgment." 659 P.2d page 1044.

Based upon Franklin Financial, the trial court was correct in deciding whether STATE FARM was entitled to judgment.

POINT TWO

APPELLANTS ARE BARRED FROM RECOVERY AGAINST STATE FARM DUE TO THEIR FAILURE TO GIVE TIMELY NOTICE OF THEIR CLAIM.

Assuming, for purposes of argument, that STATE FARM had a contractual duty running in favor of Appellants, there is still the further question as to whether that duty was negated because Appellants failed to give STATE FARM notice of the claim associated in the prior lawsuit as required by the insurance policy. Under the insurance contract, it is clear that the insured must give STATE FARM written notice of any claim arising out of any occurrence "as soon as practicable". In addition, if suit were brought, the insured also has a duty to immediately forward all demands, notices, or summons received by it to STATE FARM. These requirements on the part of the insured are a condition precedent to STATE FARM'S contractual duty under the insurance policy. Since Appellants breached the terms of the subject insurance policy, STATE FARM has no contractual duty running in their behalf.

Courts have utilized one of three basic approaches in determining whether coverage should be afforded under policies requiring notice "as soon as practicable" when the insured breaches the condition. Each approach will be discussed separately.

A. Approach One: The first approach is to determine whether reasonable notice has been timely given. If it has, then coverage is afforded under the policy. If it has not, it

is deemed to be a breach of the condition concerning notice and no coverage is afforded. Under this approach, time periods as short as six months between the date of the occurrence and the date of the notice have been deemed unreasonable. Matthews vs. Reliance Insurance Company, 534 P.2d 658 (Colo. 1975). See also Burningham Boys Club, Inc. vs. Trans America Insurance Company, 325 So.2d 167 (Ala. 1976), eight months deemed unreasonable; Taylor vs. Royal Globe Insurance Company, 240 So.2d 497, (N. Caro. 1978) nine months deemed unreasonable; L'Italia Provisions Corporation vs. Interboro Mutual Indemnity Insurance Company, 367 So.2d 968 (Ala. 1978), one year deemed unreasonable and Aetna Insurance Company vs. Springlake, Inc., 350 So.2d 397 (Ala. 1977), two years deemed unreasonable.

In Equity General Insurance Company vs. Patis, 456 N.E.2d 348 (Ill. 1983), the insured delayed nearly five months in giving notice to his errors and omissions carrier of a claim against him for professional malpractice. The insured claimed that before a delay in giving notice may serve as a basis for extinguishing the insurer's liability to an insured, the insurance company must show that it was prejudiced by the delay. As to that issue, the court held:

> "Patis reaches the misguided conclusion that it is well settled that whether or not an insurer is prejudiced by an insured's late notice of a claim is an issue of material fact. It is with this conclusion he goes awry. . . . While prejudice may be a factor in determining the question of whether an insured has given reasonable notice to the insurer, it is not a condition that will dispense with the requirement. . . Where, as here, the giving of notice has specifically been made a condition precedent to a right of action against the insurer, any prejudice resulting from a delay in giving notice becomes immaterial. . . The issue becomes not whether the insurer has been prejudiced but whether reasonable notice has been given. 456 N.E.2d at 350 and 351.

See also Yale vs. National Indemnity Company, 664 F.2d 406 (4th Circuit, N. Caro. 1981); L'Italia Provisions Corp., vs. Interboro Mutual Indemnity Insurance Company, supra; Oregon Farm Bureau Insurance vs. Safeco Insurance Company of America, 438 P.2d 1018 (Or. 1968) and Barnes vs. Wacco Scaffolding & Equipment Company, 589 P.2d 505 (Colo. 1979).

In the case at hand, the acts which gave rise to the prior lawsuit occurred in 1978. The prior lawsuit was filed against Appellants in September, 1980. Judgment was rendered in May, 1982. The first notice of this claim was not received by STATE FARM until September 21, 1983 coincident with it being served with Summons and Complaint in the instant action. Notice in this case is therefore five years after the time when the occurrence initially happened; three years from the date the prior lawsuit was filed and over sixteen months since the date judgment was granted. There has been no evidence presented by the Appellants attempting to explain or justify their failure to give notice for these periods of time.

Taking into consideration the time periods involved in the above-cited cases, all of which were deemed to be in violation of policies with "as soon as practicable" notice provisions, it is clear that the time periods involved in this case constitute a total breach of Appellant's duty to give STATE FARM notice and forward suit papers. The trial court was correct in determining that there was no insurance coverage owed by STATE FARM to Appellants. As was stated in Pharr vs. Continental Casualty Company, 429 So.2d 1018 (Ala. 1983):

> "Where an insured fails to show a reasonable excuse or the existence of circumstance which would justify a protracted delay, the court should as a matter of law hold that there has been a breach of the condition as to notice . . . " 429 So.2d at 1019.

A. Approach Two: The second approach taken by many courts in resolving the issue involves a two-step process. The court must first determine whether an insured's notice to his insurer was given "as soon as practicable" and, second, if not, whether the delay caused prejudice to the insurer's detriment. In cases dealing with a situation where there are no facts justifying the delay in giving notice or no explanation for the delay, as in the case at bar, courts have not imposed any significant requirement regarding an insurance company's burden to show prejudice. In Ideal Mutual Insurance Company vs. Waldrep, 400 So.2d 782 (Fla. 1981), in which an insured delayed in giving notice concerning the loss of his aircraft to his insurance carrier, the court, in holding for the insurance company stated:

> "We find that the trial judge overlooked the fact that in the absence of proof, the failure to give timely notice of loss is presumed prejudicial." 400 So.2d at page 785.

See also United Services Automobile Association vs. Allstate Insurance Company, 662 P.2d 1102 (Colo. 1983) and Dairyland Insurance Company vs. Marez, 601 P.2d 353 (Colo. 1979).

It is clear from the facts of the case at bar, that STATE FARM has been prejudiced due to the delay in receiving notice from the Appellants. STATE FARM has been prevented from investigating the facts surrounding the claim at a time when memories and physical evidence were fresh. Further, it has been deprived of its right to attempt settlement through normal adjustment procedures. It has been deprived of its right to hire counsel of its own choosing and to defend the litigation which followed the occurrence. At this point, one cannot argue that

STATE FARM has not been prejudiced because counsel defending Appellants in the prior lawsuit were competent and did all that could have been done had STATE FARM been allowed to obtain counsel of its choice. In Sears Roebuck & Company vs. Hartford Accident and Indemnity Company, 313 P.2d 347 (Wash. 1957), the insured waited fourteen months to forward notice of a claim against it to its insurer. Notice arrived one week before trial. In a subsequent action against the insurer for indemnification, the Washington Supreme Court held that depriving an insurer of the right to protect itself against liability in a prior suit against its insured automatically constituted prejudice. The court stated:

> "To be deprived of that right constitutes prejudice, however imponderable the damages, and however efficient and competent the attorneys retained by the insured. . . ." 313 P.2d at 353.

Under Approach Two, the trial court was correct in dismissing STATE FARM as a Party-Defendant in the instant matter.

C. Approach Three: Other courts have concluded that where a notice of claim is outside the parameters of "as soon as practicable" that prejudice against the insurance carrier is presumed and the burden shifts to the insured to rebut the presumption.

In Gerrard Realty Corporation vs. American States Insurance Company, 277 N.W.2d 863 (Wisc. 1979), a notice of claim was given twenty-two months after suit was commenced against the insured and after the same had been reduced to judgment. The court said that notice was outside the parameters of "as soon as practicable" and therefore created a rebuttable presumption of prejudice on the part of the insurer. The court further stated

that as a result of the insured's belated notice, the insurance company was denied an opportunity to investigate, defend or settle the claim brought against the insured. It further held that as a matter of law, the insurance company was prejudiced by not receiving notice until after the entry of judgment.

In applying Approach Three to the facts of the instant case, it is clear that due to the late notice given STATE FARM a presumption of prejudice was created. In light of the fact that the notice was not received by STATE FARM until after the entry of judgment in the prior lawsuit, there is clear evidence that the presumption cannot, and was not, rebutted by Appellants. After the entry of judgment, the matter is concluded and hence the insurance carrier has been denied its right to invesitgate, settle and defend the litigation. Such a factual scenario is the clearest of all cases where an insurance carrier has been prejudiced by an insured's giving late notice of a claim.

Under Approach Three, the trial court did not err in dismissing Appellant's claim against STATE FARM.

CONCLUSION

In summary, Appellants are not entitled to indemnification against STATE FARM because BUSCH is not the party against whom judgment was obtained in the prior lawsuit.

Moreover, QUAILBROOK CONDOMINIUM COMPANY is not entitled to indemnification against STATE FARM because it is not a named insured under the STATE FARM policy.

Even if STATE FARM has a contractual obligation to one or both of the Appellants named herein, the trial court was correct in dismissing Appellants' action against STATE FARM because of the late notice given STATE FARM regarding the claim against Appellants in the prior lawsuit. This same conclusion is

reached whether the facts are analyzed under Approach One, Two or Three discussed in the body of STATE FARM'S Brief under Piont Two.

Respectfully submitted this 31 day of July, 1984.

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CERTIFICATE OF MAILING

I certify that I mailed two true and correct copies of the foregoing BRIEF OF RESPONDENT STATE FARM FIRE & CASUALTY COMPANY to the following-named individuals via first-class mail, postage prepaid on this 31 day of July, 1984:

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